UBS Real Estate Sec. Inc. v Gramercy Park Land LLC
2009 NY Slip Op 33464(U)
December 9, 2009
Supreme Court, New York County
Docket Number: 103763/09
Judge: Richard B. Lowe III
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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UBS REAL ESTATE SECURITIES INC.,

Plaintiff,

-against-

Index No.
103763/09

GRAMERCY PARK LAND LLC, PERIMETER BRIDGE & SCAFFOLD CO., INC., MRC II CONTRACTING INC., MORETRENCH AMERICAN CORP., TRITON CONSTRUCTION COMPANY, GACE-GOLDSEIN ASSOCIATES CONSULTING, TOPFLIGHT CONTRACTING, LLC, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, LEONARD TAUB, NORMAN KAISH, JOHN DOES NOS. 1-100, JOHN DOE CORPORATIONS NOS. 1-100, JOHN DOE COMPANY NOS. 1-100,

Defendants.

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Hon. Richard B. Lowe, III:

Plaintiff UBS Real Estate Securities Inc. (UBS) moves (i) to dismiss the counterclaim and affirmative defenses in the answer of defendants Gramercy Park Land LLC (Gramercy), Leonard Taub, and Norman Kaish (CPLR 3211 [a] [1] and [7]), and (ii) for leave to amend the caption to substitute StabFund (USA) Inc., as UBS's assignee, in the place of UBS as the party plaintiff.

In this real estate foreclosure action, UBS is seeking foreclosure on the $34 million loan it extended to these defendants for the acquisition of certain properties and development rights in connection with the parcels of land. Defendants Gramercy, Taub, and Kaish asserted various defenses in their answer, including that UBS committed fraud by falsely representing that it would finance a construction loan for the property, and that they relied upon this promise to their

detriment. They also asserted that UBS should be estopped from enforcing its rights, the loan default should be excused because the state of the economy constitutes a force majeure event, and that UBS's culpable conduct is the cause of the damages alleged by UBS. The defendants contend that UBS lacks standing, because the note and mortgage had been assigned. UBS seeks dismissal of these defenses and counterclaim, urging that there can be no justifiable reliance, and thus, no fraud or estoppel. It also argues that there is no force majeure clause in these instruments, and that a downturn in the economy is not such an event. With regard to standing, UBS states that the loan agreements permit assignment, and that it is seeking to amend the caption to substitute in the assignee.

BACKGROUND

In August 2006, UBS agreed to extend to defendant Gramercy a loan in the principal amount of $30.5 million for the acquisition of properties and development rights in connection with land located at 276-280 Third Avenue, New York, New York (the Acquisition Loan) (Complaint, ¶¶ 2, 21-23). In connection with the Acquisition Loan, defendants Taub and Kaish executed guarantees of payment (*id.*, ¶¶ 36-37). On September 11, 2007, UBS agreed to increase the principal amount of the Acquisition Loan to $34 million (the First Amendment and Modification) (*id.*, ¶¶ 26-27). On March 11, 2008, the term of the Acquisition Loan was extended to June 11, 2008 (*id.*, ¶ 32). On June 11, 2008, the term of the Acquisition Loan again was extended to July 11, 2008 (*id.*, ¶ 33). The loan was due and payable in full on August 11, 2008, but defendant Gramercy failed to pay the sums due (*id.*, ¶ 40).

On March 18, 2009, UBS commenced this action to foreclose upon the mortgage securing the Acquisition Loan. It also seeks recovery from defendants Taub and Kaish under their

guarantees.

In their answer, defendants Gramercy, Taub and Kaish assert several affirmative defenses. In these defenses, they allege that UBS represented to them that it would provide a construction loan and mezzanine financing to provide funding for the completion of the project (Answer, ¶ 33). They assert that this representation was false, and that UBS knew it was false when made, that it was made with the intent that defendants rely upon it (*id.*, ¶¶ 35-36). They allege that, on July 20, 2007, in connection with a Loan Modification Term sheet for an increased loan amount of $3.5 million (which became the First Amendment and Modification to the Acquisition Loan), UBS required that Gramercy pay $173,145 denominated as an "air rights fee," but which was really a pre-payment of an "equity kicker" of 20% of the profit (Answer, ¶ 54). Also on July 20, 2007, UBS sent Gramercy a Mortgage Loan Application for construction financing for up to $82 million and mezzanine funding in the amount of $11 million, including an equity kicker of 20% of the profit on the project. Gramercy paid UBS an application fee of $150,000 (*id.*, ¶ 55). Defendants allege that in reliance upon UBS's representations, Gramercy did not pursue opportunities to obtain construction financing from other sources, it paid a back-out fee of $150,000 to cancel a loan commitment with another lender, and it paid $173,145 to UBS as a pre-payment of the equity kicker (*id.*, ¶¶ 59-60). Defendants assert that, at the time that UBS closed on the amendment to the Acquisition Loan and accepted the $173,145 pre-payment, it knew that it did not intend to fund the construction and mezzanine loan, and that its representations were false and fraudulent. Thus, defendants contend that UBS was unjustly enriched by that pre-payment, and that it had made a binding commitment to fund the construction and mezzanine loan. They assert that, as a result of UBS's false and fraudulent

actions, Gramercy lost its opportunity to obtain construction financing from other sources, with the resulting loss of this entire real estate project, and precipitating the default under the Loan (*id.*, ¶¶ 61-65). Thus, defendants assert that UBS should be foreclosed from maintaining this action (the second affirmative defense), or should answer in damages for fraud (fifth affirmative defense and counterclaim).

Defendants also assert in their answer that, as a result of the direst economic downturn since the Great Depression, and the resultant freeze on credit, which prevented defendants from obtaining the additional funding required to complete the project, performance on the Acquisition Loan has become commercially impossible. They state that this could not be foreseen or controlled, and seek an extension of time, without penalty, for a period until the economic conditions improve.

UBS urges that it is entitled to dismissal of the defenses and counterclaim of Gramercy, Taub, and Kaish, based on the documentary evidence, and on the ground that the defenses fail as a matter of law. It contends that the Mortgage Loan Application for the construction financing specifically and unequivocally provided that it was not a binding commitment by UBS to make the proposed loan or to issue any commitment, barring any allegations of justifiable reliance. With respect to the affirmative defense of lack of standing, UBS urges that the Acquisition Loan, in section 11.27 (a), explicitly allowed for the assignment of UBS's rights. UBS requests leave to amend the caption to substitute StabFund, as the assignee of UBS's rights, as the party plaintiff, since the assignment occurred after this action commenced. It urges that the second and fifth affirmative defenses, that UBS cannot maintain this action on the grounds of equitable estoppel, bad faith, and unclean hands, are based on defendants' assertions that they relied to

their detriment on UBS's representations that construction financing would be provided. Again, UBS urges that defendants cannot show justifiable reliance. The third affirmative defense, that the economic downturn was a force majeure event, fails, according to UBS, because there was no force majeure clause in the Acquisition Loan agreement, and economic hardship cannot form the basis of such a defense.

In opposition, defendants urge that UBS's conduct constituted a waiver of its right to foreclose, and seek dismissal of the complaint on a theory of promissory estoppel. They contend that based on the doctrine of force majeure or impossibility of performance, they may seek a reasonable extension of time, without penalty, until the economic conditions improve. They urge that this court may take judicial notice of the fact that this country is in the direst financial downturn since the Great Depression, and the fact that, after UBS reneged on its promise to finance the construction, there was a complete freeze on credit from other sources, and Gramercy was unable to find financing to complete the project. As to the standing issue, defendants contend that there are fact issues as to the actual date of the assignment.

DISCUSSION

Motion to Amend

UBS has demonstrated, and defendants fail to present conflicting evidence, that UBS assigned its rights under, and interests in, the Acquisition Loan to StabFund (USA) Inc. This assignment was explicitly permitted in section 11.27 (a) of the Acquisition Loan (Exhibit A to Notice of Motion, Acquisition Loan, § 11.27 [a], at 75). UBS has presented proof that the assignment, recorded on April 22, 2009, occurred after this action was commenced on March 18, 2009. It is, therefore, appropriate to substitute StabFund (USA) Inc., as the assignee of USB's

rights in the Acquisition Loan, as the party plaintiff. There is no prejudice to the Gramercy defendants or any hindrance in the preparation of their defense (*see Barclays Bank plc v Skulsky Trust*, 287 AD2d 365, 366 [1st Dept 2001]). Therefore, UBS is granted leave to amend the caption, and the defendants' first affirmative defense based on lack of standing is dismissed.

Motion to Dismiss the Affirmative Defenses

The defendants' second and fifth affirmative defenses based on fraud and promissory estoppel, and the counterclaim based on fraud, are dismissed. On a motion to dismiss, pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction, the court must accept the facts as alleged in the pleading as true, and determine whether the pleading fits within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[B]are legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence, . . . are not presumed to be true on a motion to dismiss for legal insufficiency" (*O'Donnell, Fox & Gartner, P.C. v R-2000 Corp.*, 198 AD2d 154, 154 [1st Dept 1993] [citation omitted]). A motion pursuant to CPLR 3211 (a) (1) will be granted if the movant presents documentary evidence that "definitively dispose[s] of the claim" (*Demas v 325 West End Ave. Corp.*, 127 AD2d 476, 477 [1st Dept 1987]).

The Gramercy defendants' fraud defenses and counterclaim are based on the same basic allegations. They allege that UBS represented that it would provide the construction and mezzanine financing for the project, that this representation was false, and known by UBS to be false when made, and that these defendants relied to their detriment. First, these allegations fail to satisfy the particular pleading requirements for a fraud claim set forth in CPLR 3016 (b). There is no specificity as to who made the representations, when they were made, and to whom,

and, thus, the pleading is insufficient. Second, the Mortgage Loan Application for the construction and mezzanine funding clearly contradicts the Gramercy defendants' allegations that UBS falsely and fraudulently represented that it would fund the loan, and that Gramercy reasonably relied on those representations (*see* Exhibit E to Notice of Motion). To state a claim for fraud, a plaintiff must allege a misrepresentation or omission of a material fact, falsity of the representation, scienter, reasonable reliance, and damages (*Stuart Silver Assoc., Inc. v Baco Dev. Corp.*, 245 AD2d 96, 98 [1st Dept 1997]). The Mortgage Loan Application clearly provides that UBS "would consider providing financing" but that "[t]his Application constitutes neither an offer nor a commitment by UBS, but rather summarizes the general terms under which UBS would be willing to fund the Loan" (Exhibit E to Notice of Motion, at 1). The Mortgage Loan Application further provides, in bold capital letters, that neither the application nor the acceptance of the application fee "SHALL CONSTITUTE A BINDING COMMITMENT BY LENDER OR AN UNDERTAKING BY LENDER TO MAKE THE PROPOSED LOAN OR TO ISSUE ANY COMMITMENT" (*id.* at 10). The Mortgage Loan Application also provided that Gramercy acknowledged that the terms were not final, and that it submitted the application and fee solely to induce UBS to conduct a further review and investigations (*id.*). This explicit language clearly contradicts the Gramercy defendants' allegations that they relied on promises that UBS would fund the project's construction. It demonstrates that, as a matter of law, the Gramercy defendants could not have reasonably relied upon any purported representations that the loan would be approved (*see Meadowlands Investments, LLC v CIBC World Markets Corp.*, 2005 WL 2347856 [SD NY 2005] [applying New York law] [no justifiable reliance where application stated that it was not offer, binding contract, or commitment by lender]; *Cohen v*

Lehman Bros. Bank, FSB, 273 F Supp 2d 524 [SD NY 2003] [applying New York law] [borrower's application for a loan did not constitute an enforceable agreement]).

In *Meadowlands Investments, LLC v CIBC World Markets Corp.*, the borrower brought claims for fraud against a lender, where the parties had signed an application letter for a refinancing loan, but the lender ultimately refused to make the loan (2005 WL 2347856 at * 1-2). The borrower alleged that the defendants had advised it that the refinance loan was a "done deal," and that the lender would process the application quickly (*id.* at *2). The Application Letter provided that the lender was not obligated to make the contemplated loan unless and until certain conditions were met, and that the application was "not an offer, a contract, a binder, a memorandum of contract, a commitment or a promise by [the lender] to make the Loan" (*id.*). On the defendants' motion to dismiss, the court dismissed the borrower's fraud claims. It found that the borrower failed to adequately plead the elements of fraud, particularly reasonable reliance. It reasoned that the borrower signed the application stating that the lender was not obligated to approve the loan, and, thus, it could not have reasonably relied upon any representations by the lender that the application would be approved (*id.* at 5).

Here, the Mortgage Loan Application clearly stated that it was not an offer or a commitment by UBS, and that "neither this application nor the acceptance by [UBS] of the application fee and the good faith deposit shall constitute a binding commitment by [UBS] or an undertaking by [UBS] to make the proposed loan or to issue any commitment" (Exhibit E to Notice of Motion, at 10). Gramercy also acknowledged in the application that UBS would be making further investigations and reviews of the proposed loan to determine if it would meet UBS's underwriting requirements (*id.*). This language clearly contradicts the Gramercy

defendants' allegations that they reasonably relied upon representations that UBS would make the loan.

The defendants' submission of the affidavit of Leonard Taub, vice president of Gramercy, does not save the defense and counterclaim. Mr. Taub's assertions that UBS convinced Gramercy to forgo other lenders, and that UBS would provide all of its financing needs, again fail to show how it could have reasonably relied in light of the explicit and unambiguous disclaimer in the Mortgage Loan Application that Gramercy executed. The e-mails defendants submit between Kaish, Taub, and Mark Wolfson, Gramercy's broker, do not evidence misrepresentations by UBS. In fact, they show that defendants were aware that they needed to close the construction loan as soon as possible, because something negative could happen in the condominium market, the lender could pull out and they would have no loan, and that this "is also true of UBS even though they are 100% in favor of the loan now" (Exhibit B to Affidavit of Leonard Taub, dated July 13, 2009). Gramercy's allegations regarding its pre-payment of $173,145 as the "equity kicker" set forth in the Mortgage Loan Application, is belied by the First Amendment and Modification, entered into by the parties with regard to the Acquisition Loan. In that First Amendment and Modification, UBS agreed to extend the term of the Acquisition Loan, and loan Gramercy an additional $3.5 million, and Gramercy made the payment of $173,145 as an "Additional Development Parcels Fee." Thus, this $173,145 fee that Gramercy paid was made in connection with UBS's additional funding of the Acquisition Loan, not the "equity kicker" proposed in the Mortgage Loan Application

For the same reason, the Gramercy defendants' defense based on promissory estoppel also fails. To state a claim under a promissory estoppel theory, the party must allege (i) a clear

and unambiguous promise, (ii) reasonable and forseeable reliance, and (iii) injury sustained as a result of the reliance (*see New York City Health and Hosp. Corp. v St. Barnabus Hosp.*, 10 AD3d 489, 491 [1st Dept 2004]). The party must also demonstrate that it would be unconscionable to invoke the statute of frauds to bar the claim (*see Fleet Bank v Pine Knoll Corp.*, 290 AD2d 792, 797 [3d Dept 2002]). Not only is there a lack of sufficient allegations of a clear and unambiguous promise to approve the application (*see Cohen v Lehman Bros. Bank, FSB*, 273 F Supp 2d at 529), the language of the application, as discussed above, bars the defendants' assertions that they reasonably relied (*see New York City Health and Hosp. Corp. v St. Barnabus Hosp.*, 10 AD3d at 491; *see also Jordan Panel Sys., Corp. v Turner Constr. Co.*, 45 AD3d 165 [1st Dept 2007] [no promissory estoppel claim where party could not have reasonably relied]). Their claim of unconscionable injury, in the form of costs incurred in cancelling other applications and in obtaining other financing, does not constitute unconscionable injury warranting the application of promissory estoppel (*see River Glen Assocs., Ltd. v Merrill Lynch Credit Corp.*, 295 AD2d 274, 274 [1st Dept 2002]).

The Gramercy defendants' fourth affirmative defense also is dismissed. In their answer, these defendants vaguely allege that the "culpable conduct" of UBS brought about the alleged damages without any culpable conduct by the defendants. It is not apparent the basis of this defense, and, as determined above, to the extent that it is based on the alleged misrepresentations about the Mortgage Loan Application, those allegations fail to state a claim.

The Gramercy defendants' third affirmative defense, based on the theory of impossibility of performance, is dismissed. These defendants allege in their answer that, because of the "direst financial downturn since the Great Depression of 1929, and the resultant freeze on credit,"

performance on the Acquisition Loan has become impossible (Answer, ¶ 39). They allege that this situation could not be controlled or anticipated, and could not have been foreseen or guarded against in the contract (*id.*, ¶¶ 40-41). They contend that based on the doctrine of force majeure or impossibility of performance, they are seeking relief in the form of an extension of time, without penalty, for a period of time until the economic conditions improve, and they can obtain construction financing or sell the property (*id.*, ¶ 42).

The force majeure doctrine does not help defendants. The Acquisition Loan does not contain a force majeure clause, much less one specifying the occurrence that the Gramercy defendants seek to have treated as a force majeure. Thus, there is no basis for a force majeure defense (*see General Elec. Co. v Metals Resources Group, Ltd.*, 293 AD2d 417, 418 [1st Dept 2002]).

The impossibility of performance doctrine also fails to provide a defense here. "Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must have been produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (*Kel Kim Corp. v Central Markets, Inc.*, 70 NY2d 900, 902 [1987] [citations omitted]). Where the impossibility of performance is caused only by financial difficulty or economic hardship, even to the point of bankruptcy or insolvency, contractual performance is not excused (*407 East 61st St. Garage, Inc. v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 281 [1968]).

Gramercy's payment obligations under the Acquisition Loan are not excusable as impossible to perform. Gramercy's inability to procure a construction financing loan could have

been foreseen and guarded against when it entered into the Acquisition Loan. Even if this court were to find that the inability to procure construction financing was caused by the credit crisis and the extent of the economic crisis could not have been anticipated, the difficulty of Gramercy's performance is occasioned only by financial or economic hardship, which is not a basis to excuse performance (*see 407 East 61st St. Garage Inc. v Savoy Fifth Ave. Corp.*, 23 NY2d at 281; *General Elec. Co. v Metals Resources Group, Ltd.*, 293 AD2d at 418 [even where defendant's performance is rendered financially disadvantageous by circumstances unforeseen at time of contracting, performance not excused as impossible]; *Barclays Business Credit, Inc. v Inter Urban Broadcasting of Cincinnati, Inc.*, 1991 WL 258751, *8 [SD NY 1991] [no impossibility defense based on slowdown in local economy causing economic hardship]).

The Gramercy defendants' reliance upon *Hoosier Energy Rural Elec. Coop., Inc. v John Hancock Life Ins. Co.* (588 F Supp 2d 919 [SD Ind 2008], *affd but criticized* 582 F3d 721 [7th Cir 2009]) is misplaced. In *Hoosier Energy*, the owner of an electric generating plant sought an injunction, enjoining an insurance company and a credit default swap provider from asserting a default, and demanding or making payment under a "sale in, lease out" transaction. The parties' agreement provided that if the credit default swap provider's credit rating dropped below a specific threshold, the plaintiff would have 60 days to find a new qualified swap provider. All the parties were making all payments required under the contracts (*Hoosier Energy Rural Elec. Coop., Inc. v John Hancock Life Ins. Co.*, 588 F Supp 2d at 921, 924). The credit default swap provider's credit rating fell below the specified level, and, because of the credit crisis in the summer and fall of 2008, there were only three possible qualifying partners. Thus, it was impossible or nearly impossible for plaintiff to find a substitute provider with a sufficient rating,

in the time period, and at any price. The insurer then declared a default. First, the court determined that, because the transaction was illegal and void as against public policy, it would issue an injunction to preserve the status quo until it could be determined if any part of the transaction could be enforced, or if the court had the power to unwind the illegal transaction in a way to minimize windfalls and unfair burdens for particular parties (*id.* at 927-930). Alternatively, the court agreed with the plaintiff's argument that there was a temporary commercial impracticability, preliminarily determining that plaintiff was entitled to a 90-day extension to find a new credit default swap partner (*id.* at 932-933). The court found it significant that the plaintiff was not asking that the insurer excuse its performance for an uncertain or unlimited period of time. Rather, it was asking for an additional 90 days where it already had a deal on the table to replace the credit swap provider, and just needed more time to finalize the deal (*id.*).

On appeal, the Seventh Circuit disagreed with the district court's reasoning with regard to the doctrine of commercial impracticability (*Hoosier Energy Rural Elec. Coop., Inc. v John Hancock Life Ins. Co.*, 582 F3d at 726). It noted that the parties anticipated the risk that plaintiff or its swap provider could get into financial distress, and provided that plaintiff would have to come up with better security in 60 days, or the insurer could draw on the credit default swap to protect itself. By the district court preventing the insurer from doing so, it defeated the parties' bargained-for allocation of risks (*id.* at 727). The Circuit Court observed that while the district court may have thought that "economy-wide conditions justified this reallocation, . . . it is hard to see how an economic downturn can be alleviated by making contracts less reliable" (*id.* at 727). It also specifically observed that if Hoosier Energy had borrowed money and was obligated to

pay it back by a certain date, its inability to borrow money to roll over that loan "would not excuse repayment; the 'impossibility' doctrine never justifies failure to make a payment, because financial distress differs from impossibility" (*id.* at 728 [citation omitted]). The Circuit Court also observed that New York courts take a very dim view of "impossibility" defenses, and have never suggested that when an impossibility defense does not work a "temporary commercial impracticability" defense might work better (*id.* at 728). The court found that to satisfy the impossibility defense, the plaintiff must show more than a short-term inability to pay money (*id.* at 729, citing *General Elec. Co. v Metals Resources Group, Ltd.*, 293 AD2d 417, *supra*). It also observed that the impossibility defense would be unavailable to Hoosier Energy if it just had an option to replace the swap provider, as opposed to a duty to replace it (*id.* at 729).

Not only is *Hoosier Energy* factually distinguishable, but the Seventh Circuit decision makes clear that it would not apply to the facts in this case. Unlike in *Hoosier Energy*, Gramercy has not met its payment obligations under the Acquisition Loan. In addition, as the Seventh Circuit observed, the impossibility defense never justifies failure to make a payment. Gramercy is failing to pay the Acquisition Loan, because UBS did not agree to provide the construction financing, and because it asserts that it was unable to obtain another construction loan. This financial distress will not support an impossibility defense. Moreover, defendants, here, are asking UBS to excuse Gramercy's performance for an uncertain and possibly unlimited time period. In contrast, in *Hoosier Energy*, the district court specifically noted that the plaintiff was only asking for a very limited time period of 90 days where it demonstrated that it had another deal which it just needed additional time to finalize. Therefore, this affirmative defense also fails and is dismissed.

also fails and is dismissed.

Accordingly, it is

ORDERED that the branch of the plaintiff's motion for leave to amend the caption to replace UBS Real Estate Securities Inc. with StabFund (USA) Inc., as UBS's assignee, as the party plaintiff, is granted and the caption shall read: StabFund (USA) Inc., as assignee of UBS Real Estate Securities Inc. v Gramercy Park Land LLC, et al.; and it is further

ORDERED that the branch of plaintiff's motion to dismiss the affirmative defenses and counterclaim of defendants Gramercy Park Land LLC, Leonard Taub, and Norman Kaish is granted and those defenses and counterclaim are dismissed.

It is directed that a copy of this order be served upon the Trial Support Office and the County Clerk who shall alter their records to reflect the changes in the caption.

Dated: December 9, 2009

ENTER:

J.S.C.